

In the Matter of the Compensation of
BRANDON E. LAMB, Claimant
WCB Case No. 20-00040
ORDER ON REVIEW
Moore & McQuain, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey and Ogawa.

Claimant requests review of that portion of Administrative Law Judge (ALJ) McWilliams's order that affirmed an Order on Reconsideration that did not award an assessed attorney fee under ORS 656.383(1). On review, the issue is attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

In December 2012, claimant compensably injured his right knee. (Ex. 3).

In October 2019, the SAIF Corporation accepted a new or omitted medical condition claim for right knee medial compartment osteoarthritis. (Exs. 3-1, 4-1, 7-1). SAIF had previously accepted a right knee medial meniscus tear condition. (Exs. 3-1, 4-1, 7-1).

An October 2019 Notice of Closure awarded temporary disability benefits, but no permanent disability benefits. (Ex. 1-1). Claimant requested reconsideration. (Ex. 6).

A December 2019 Order on Reconsideration found that claimant's new or omitted medical condition claim for right knee medial compartment osteoarthritis was prematurely closed. (Ex. 7-3). Accordingly, the reconsideration order rescinded the October 2019 Notice of Closure. (*Id.*) The reconsideration order did not address claimant's entitlement to temporary disability benefits. (Ex. 7). Moreover, the Order on Reconsideration awarded an out-of-compensation attorney fee equal to ten percent of any additional compensation awarded, but did not award an assessed attorney fee under ORS 656.383(1). (Ex. 7-3). Claimant requested a hearing regarding the ORS 656.383(1) attorney fee issue.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant's attorney was not entitled to an assessed attorney fee under ORS 656.383(1). Accordingly, the ALJ upheld the Order on Reconsideration.

On review, claimant contends that ORS 656.383(1) applies. Based on the following reasoning, we disagree with claimant's contention.

As the party challenging the Order on Reconsideration, claimant has the burden of establishing error in the reconsideration process. *See Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000); *Fred D. Harris*, 70 Van Natta 1105, 1105-06 (2018). ORS 656.383(1) provides for a reasonable assessed attorney fee if a claimant's attorney is instrumental in obtaining temporary disability compensation benefits prior to a decision by an ALJ. An ORS 656.383(1) attorney fee is awardable for a claimant's attorney's services during a reconsideration proceeding if the reconsideration proceeding establishes entitlement to temporary disability benefits prior to a decision by an ALJ. *See Dancingbear v. SAIF*, 314 Or App 538, 549 (2021); *John C. Cole*, 74 Van Natta 692, 693 (2022).

Here, the record does not establish that claimant's attorney was instrumental in obtaining temporary disability benefits. (Ex. 7); *see* ORS 656.383(1). Specifically, the Order on Reconsideration did not award temporary disability benefits or otherwise address claimant's entitlement to those benefits. (Ex. 7). Rather, the reconsideration order found only that the claim was prematurely closed. (Ex. 7-3); *see Bledsoe v. City of Lincoln*, 301 Or App 11, 16 (2019) (issue of medically stationary date did not encompass entitlement to temporary disability benefits). Moreover, the record does not establish that claimant is entitled to temporary disability benefits as a result of the reconsideration proceeding. Under such circumstances, ORS 656.383(1) does not apply. *See John C. Cole*, 74 Van Natta 692, 694 (2022) (ORS 656.383(1) did not apply where the Order on Reconsideration rescinded the Notice of Closure as premature, but did not award additional temporary disability benefits); *Robert L. Stanley*, 74 Van Natta 359, 359 (2022) (same).

Citing *Dancingbear v. SAIF*, 314 Or App 538 (2021), claimant contends that his attorney is entitled to an ORS 656.383(1) attorney fee. However, *Dancingbear* is distinguishable. In that case, an Order on Reconsideration awarded additional temporary disability benefits. 314 Or App at 541. Analyzing ORS 656.383(1), the

court determined that an assessed attorney fee is awardable under that statute when a claimant's attorney is instrumental in obtaining temporary disability benefits during the reconsideration proceeding. *Id.* at 549.

Here, unlike in *Dancingbear*, the Order on Reconsideration did not award additional temporary disability benefits or address claimant's entitlement to those benefits, as stated above. (Ex. 7). Accordingly, *Dancingbear* does not support claimant's position. *See Cole*, 74 Van Natta at 694 (distinguishing *Dancingbear* because the reconsideration order did not award additional temporary disability benefits); *Stanley*, 74 Van Natta at 359 (same).

In the alternative, claimant requests remand to the Hearing Division for additional evidence taking regarding whether claimant has obtained temporary disability benefits as a result of the reconsideration order. However, because claimant requested a hearing from the reconsideration order, the record is statutorily limited to that developed during the reconsideration proceeding. *See* ORS 656.268(8)(h); ORS 656.283(6). Because the ALJ would be unable to consider additional evidence, such evidence is not reasonably likely to affect the outcome of the attorney fee issue. *See Cole*, 74 Van Natta at 694 (remand was not appropriate where the proffered temporary disability evidence was inadmissible because it was not a part of the reconsideration record); *see also SAIF v. Avery*, 167 Or App 327, 333 (2000) (a compelling reason justifying remand to the Hearings Division exists only when the new evidence (among other things) is likely to affect the outcome of the case). Therefore, remand is not appropriate. *See Avery*, 167 Or App at 333; *Cole*, 74 Van Natta at 694.

In sum, for the aforementioned reasons, we find that claimant's counsel is not entitled to an assessed attorney fee under ORS 656.383(1). *See Cole*, 74 Van Natta at 694; *Stanley*, 74 Van Natta at 359. Consequently, claimant has not met his burden to establish error in the reconsideration process. *See Callow*, 171 Or App at 183; *Harris*, 70 Van Natta at 1105-06. Accordingly, we affirm.

ORDER

The ALJ's order dated June 9, 2020, is affirmed.

Entered at Salem, Oregon on March 22, 2023